Congressional Research Service

Memorandum December 2, 2005

TO: House Government Reform Subcommittee on Federalism and the Census

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SUBJECT: Proposed Constitutional Amendment Basing House Apportionment on Citizenship

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This memorandum provides the text of my presentation to the Subcommittee for a hearing scheduled for December 6, 2005, at 10 am. The purpose of the hearing is to conduct oversight with respect to H. J. Res. 53, proposing an amendment to the United States Constitution. The proposal would alter the Constitution so as to provide that the apportionment to the States of Members in the House of Representatives would be based upon the Census count of the number of persons in each State who are citizens of the United States.

The Subcommittee has requested that I appear to discuss the process of constitutional amendment permitting an assessment of the prospects of the proposal. Additionally, I was asked to treat insofar as it is possible for me to do so the actual proposal itself. Inasmuch as employees of the Congressional Research Service are mandated to offer nonpartisan information and analysis to Congress, I am unable to treat the merits of the proposal, but there are certain interpretive questions that I can touch on for the Committee.

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The Framers provided in the original Constitution for apportionment of Representatives to be based upon total population. Article I, § 2, cl. 3. "Representatives . . . shall be apportioned among the several States which may be included within the Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons." The clause further provides that the determination is to be made through a Census every ten years.

The three-fifths provision was, of course, a compromise between the slave-holding States and the free States. Those States in which slavery existed wanted to count each slave as a full person to maximize the representation of those States in the House and in the electoral college for the election of the President; those States which did not allow slavery did not want to count slaves at all because the weight to be given that number was artificial in view of the condition of slaves as chattels belonging to other people. Neither side intending to yield to the other, the three-fifths provision was adopted as the necessary compromise to obtain the Constitution. Following the Civil War, Congress proposed and the States ratified the Fourteenth Amendment, which, *inter alia*, did away with the provision, in light of the abolition of slavery by the Thirteenth Amendment. "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." (In this connection, there are no longer in the United States any "Indians not taxed").

The Framers did not leave behind any express rationale for the decision to count the whole number of persons in each State and to base House apportionment on that count. The decision to include noncitizens in the count and the basis, noncitizens not being permitted to vote, might be seen as a simple recognition that large numbers of other persons, a majority no doubt, who were included in the calculation for apportionment could not vote either. In Article I, § 2, cl. 1, it was provided that the electors of Representatives would be those who, in each State, met the qualifications required to be able to vote for the most numerous branch of the state legislature. Congress, in other words, had no authority to fix the qualifications, and the qualifications varied State by State. In general, at that time and for some years afterward, only white males of a certain minimum age (practically always 21), who owned property of varying values could vote. Gradually over the years the right of suffrage was enlarged, all white males above a certain age, women in more and more States through the Nineteenth Century, African-Americans similarly. Following the Civil War, many States to the West, in order to encourage migration into those States, permitted lawful aliens to vote, provided only that those persons executed an oath that they intended to apply for citizenship as soon as they were eligible.

Therefore, it seems, although it cannot be decisively established, that eligibility to vote or ineligibility to vote played little if any role in the Framers' decision to count the whole number of all persons for purposes of apportionment.

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The process of amending the Constitution, as set out in Article V, is intentionally arduous. There are two methods for proposing amendments and two methods for ratifying them. In terms of proposing, the method used in all the amendments so far proposed and ratified has been passage by Congress by a two-thirds vote of each House present and voting (provided the existence of a quorum). The second method, never successfully used, is for two-thirds of the States to petition Congress for a national convention to be convened to propose amendments, and Congress is thus obligated to act. In terms of ratification, Congress must choose at the time of proposing whether action is to be taken by the legislatures of the States or will be the responsibility of conventions to meet in each State. In any event, three-fourths of the States must affirmatively act. Of the twenty-seven amendments that have been ratified, twenty-six were ratified by state legislatures, and only

one, the Twenty-First, repealing the Prohibition Eighteenth Amendment, was approved by state conventions. Six proposed amendments have failed of ratification.

There are many issues, major and minor, involved in the amending process. I will only touch briefly on several at this point, but I will be happy to attempt to respond to specific questions that Members may have. Occasionally opponents of a proposal, either while it is being considered or in litigation following its ratification, have attempted to divine restraints upon the power of amendment and to contend that some proposal is unconstitutional. On two occasions, the Supreme Court has been confronted with the argument, and it has quickly rebuffed it. A properly ratified amendment becomes a part of the Constitution, and it cannot be seriously contended that it is unconstitutional. Now, this leaves open the question of what might detract from a "proper ratification." It has from time to time been brought forward the assertion that the Fourteenth and Fifteenth Amendments were not validly ratified, because the Reconstruction Congress coerced certain States to act by conditioning readmission to the Union upon ratification. That argument has never been made in the Supreme Court, but it has been made in lower federal courts, all of which have summarily ruled against it.

A related argument concerning those two Amendments are whether a State that has ratified a proposal may rescind the ratification, or, contrarily, whether a State that has once refused to ratify may then reconsider and ratify on a second occasion. Some States took one or the other action with regard to either the Fourteenth or Fifteenth Amendment. Congress and the executive branch officer responsible for certifying ratifications in both instances counted all the States, choosing to permit reconsideration after rejection but refusing to recognize rescissions. The courts have never adjudicated the issue. The matter arose again during consideration of the Equal Rights Amendment, there being several rescissions, but the proposal was never finally ratified and there was consequently no occasion to take the issue to court.

An argument that has frequently arisen concerns the timeliness of ratification. The early proposals did not contain a time limitation for ratification, so that amendments not adopted in the early days were presumably still open for state action. Indeed, this precise occasion arose. Congress had in the First Congress proposed twelve amendments, ten of which were ratified, becoming the Bill of Rights. Two were not ratified, but in 1992 enough States acted to ratify one of those proposals, the Twenty-Seventh Amendment, a provision relating to congressional pay. Both Congress and the executive branch official endorsed the validity of the timeliness of the ratification. Of course, no occasion for invoking the Amendment has arisen, so that no test case has been possible.

But questions of timeliness have arisen on other occasions. No Amendment previous to the Eighteenth Amendment contained any time limitation. Congress included one in the Eighteenth, because a case came to the Supreme Court questioning whether a State could ratify a child labor amendment years after it had been proposed. The Court held, as best as can be determined from a confusing set of opinions, that the question of timeliness was a "political question" not suitable for a judicial resolution. Since the Eighteenth, save for the Nineteenth Amendment, Congress has included a seven-year ratification period (as the proposed H. J. Res. 53 does), and the Court has indicated that it is proper for Congress to do so.

One final issue may interest us. Congress had included a seven-year period in the proposed Equal Rights Amendment. When the end of the period came near, without an adequate number of ratifications, a debate arose in Congress whether Congress should and could extend the time without seeking action again by the States that had already ratified it. The earlier time periods had been included in the actual text of the proposals and it was conceded that Congress could not have extended those periods inasmuch as they were part of what States had ratified. But later time periods were included in the resolution of the proposal on which the States had not acted. Because the Equal Rights Amendment period was included in the resolution, as it is in H. J. Res. 53, it was permissible, as it was argued, for Congress to extend it. Congress so voted a three-year extension. A federal district court held the extension invalid, and the Supreme Court granted review. But the extended time-period ran out before the Court acted, and without enough ratifications, so the case was mooted. We received no definitive answer. The Subcommittee may wish to consider where the time limitation in this proposal should be placed.

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Some consideration might be given to the effects on state action of a constitutional amendment that requires a citizen basis as the standard for apportionment. Would it have any impact on state choices of districting for congressional and state-legislative districts? If a State receives a number of congressional seats computed on the basis of citizen population, would that State be obligated to draw district lines based on citizen population? Would its discretion be larger with respect to drawing state-legislative districts? If a State did choose to use citizen population for such districting, would that action fail to pass the constitutional test of "one person, one vote?"

In practically all the cases, the Supreme Court has used total population figures for purposes of computing variations between and among districts. In *Burns v. Richardson*, 384 U.S. 73 (1966), the use of eligible voter population as the basis for apportioning in the context of a State (Hawaii) with a large transient military population was approved, but with the caution that such a basis would be permissible only so long as the results did not diverge significantly from that obtained by using a total population base. And see *Davis v. Mann*, 377 U.S. 678, 691 (1964). The case law is too sparse to permit much of a judgment, but it certainly appears to be an issue meriting consideration.

It should be observed that with respect to congressional districting in the States, the "times, places, and manner" clause of Article I, § 4, cl, would empower Congress either to mandate that the States use citizen population for congressional districting or to draw the lines itself. Most of the exercises of congressional power under this clause since the 1840s has involved regulation of congressional districting. See *Smiley v. Holm*, 285 U.S. 355 (1932).

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I stand ready to respond to your inquiries.